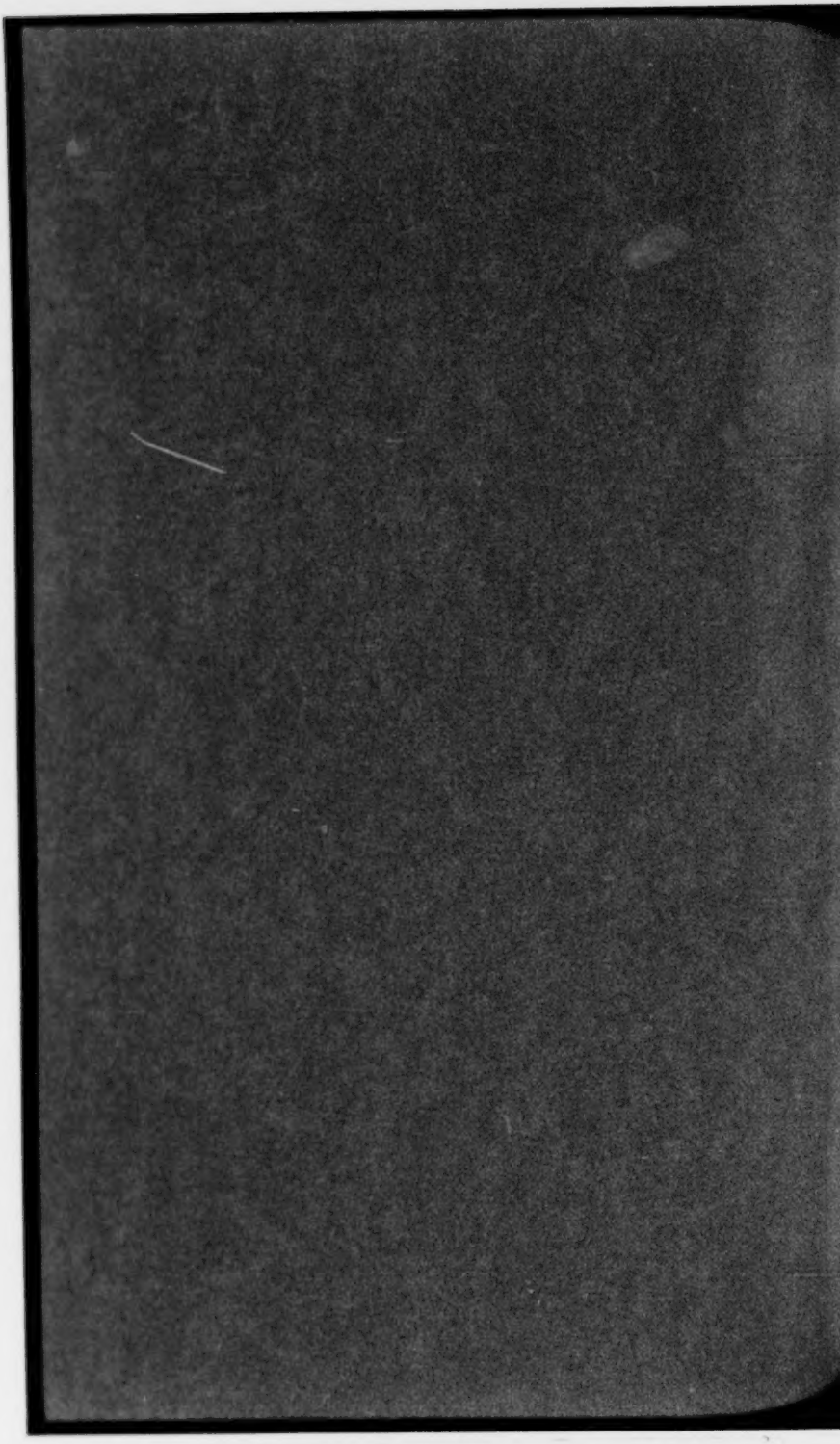

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 324.

J. & L. SNOUFFER, INC.,
Petitioner,

vs.

WILBUR B. ADAMS, ET AL.,
Respondents.

BRIEF OF RESPONDENTS.

STATEMENT.

All relevant facts are set forth in the bill of complaint filed in the District Court (Record, pages 2a-11a).

Material allegations of fact were, of course, admitted for purposes of defendant's motion to dismiss, but conclusions

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of law were not. These facts were well stated by the opinion of the District Court granting defendant's motion to dismiss (Record, pages 12-a-17a). They may be summarized as follows:

In May, 1947, respondents herein brought action in the Common Pleas Court of Franklin county, Ohio, to enjoin Lillian E. Snouffer and her Ohio lessee corporation, J. & L. Snouffer, Inc., from establishing a stone quarry on her land.

At the time of the trial, June, 1948, Lillian E. Snouffer and her lessee Ohio corporation having then started the quarrying of stone on the said premises, a supplemental petition was filed as authorized by the Ohio statute as will be hereinafter shown, praying the defendants be enjoined from carrying on such activities.

Such Common Pleas Court in December, 1948, permanently enjoined the defendants from establishing, maintaining or operating a stone quarry on said premises, and from blasting, crushing or quarrying stone thereon.

In July, 1949, the Court of Appeals of Franklin county, Ohio, after hearing the case de novo likewise so enjoined Lillian E. Snouffer and her lessee corporation.

In December, 1949, the Supreme Court of Ohio refused to grant a motion to certify the record to that court for review.

In November, 1950, Lillian E. Snouffer and her lessee corporation filed a motion in the Court of Appeals of Franklin county, Ohio, to vacate, suspend or modify the previous judgment of said court of July, 1949, which was denied by said Court of Appeals of Franklin county, Ohio, in June 1951. This action of said Court of Appeals was not carried to the Supreme Court of Ohio by motion to certify or otherwise.

The bill of complaint filed in the District Court states that the land in question where the state courts had enjoined

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the operation of a stone quarry is still owned by Lillian E. Snouffer and is now under lease to a new Delaware corporation of the same name as her Ohio corporation (Record, page 2a).

The transcript of record filed in this court on page 11a does not show who verified the complaint filed in the District Court but merely states that the same was "duly verified". The complaint was verified by the president of this new lessee Delaware corporation, this same Lillian E. Snouffer, owner of the land in question, as noted in the opinion of the District Court (Record, page 13a).

There is no allegation in the bill of complaint of fraud in any of this litigation in the state courts, nor has any claim of fraud been made at any time.

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ARGUMENT.

I.

THERE WAS NO JURISDICTION IN THE DISTRICT COURT UNDER PETITIONER'S COMPLAINT OVER THE SUBJECT MATTER.

It is established that federal jurisdiction cannot be conferred by creating a new successor corporation giving diversity of citizenship when it appears on the record, as in the case at bar, that such successor corporation is created merely to give diversity of citizenship for either a temporary or special purpose and the power remains to annul this diversity as soon as such purpose is served. Under these circumstances such successor corporation is not the real party in interest.

The Court of Appeals for the Eighth Circuit in **Amalgamated Clothing Workers v. Curlee Clothing Co.**, 19 F. 2d, 439, said:

> "The real question is one of law and is whether the Delaware corporation was, under these circumstances, so dependent and free as to this property and business that it can appear in a federal court as a litigant * * *. The motive with which this is done is not always controlling. The test is whether it is done with the purpose and in such a manner as to work a fraud upon the federal court by creating a temporary and, in reality, a spurious citizenship. **Where the purpose is merely to create diversity of citizenship for such temporary or special purpose and where the power remains to annul this diversity as soon as it has served such purpose, there is such fraud.**" (Emphasis ours.)

There can be no question but that all facts were before the District Court to show that the power remained in the real

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party in interest, the owner of this property to annul the diversity of citizenship created for the purpose of this litigation as soon as it has served her purpose. The complaint shows that this owner, Lillian E. Snouffer, was the owner of the property at the time that litigation began in the Common Pleas Court of Franklin county, Ohio, and that she and her lessee corporation were enjoined by the Common Pleas Court and the Court of Appeals from conducting stone quarrying operations on this property. The bill of complaint shows that all interest of the Ohio lessee corporation was then transferred to the new Delaware lessee corporation of the same name, and the bill is verified by the president of the new Delaware lessee corporation, this same Lillian E. Snouffer.

The District Court in its opinion noted the fact which was before the court that "the same individuals owned the Delaware corporation that had formerly owned the Ohio corporation; further that the sole and only reason for the transfer was to make it possible for a suit to be brought in federal court." (Record, page 13a.)

The case of **Amalgamated Clothing Workers v. Curlee Clothing Company**, supra, was cited with approval by the Court of Appeals for the Sixth Circuit in **Tower Realty Co. v. City of East Detroit, Michigan**, 185 Fed. 2d, 590, and again in **Tower Realty, Inc. v. City of East Detroit**, 196 Fed. 2d, 710.

In **Lehigh Mining & Mfg. Co. v. Kelly**, 160 U. S., 327, this court had under consideration facts which were closely analogous to those at bar. A corporation was organized in another state than that in which the action was brought by the stockholders and officers of a corporation of the latter state, and land was conveyed to the former by the latter corporation, without consideration, and only for the purpose of giving jurisdiction to the United States Circuit Court of

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an action to recover land on the ground of the diverse citizenship of the parties. The arrangement was held to be collusive and a fraud upon the court, and the case was dismissed for want of jurisdiction.

In the course of its opinion this court said at pages 338, 339:

> "It is clear that the record justifies the assumption that there was no valuable consideration for the conveyance to the Pennsylvania corporation. Why should a valuable consideration have passed at all, when the stockholders of the grantor corporation were, at the time of the conveyance, the same individuals? Could it be expected that those stockholders, acting as one body, under the name of the Virginia Coal & Iron Company, would take money out of one pocket for the purpose of putting it into another pocket which they had and used only while acting under the name of the Lehigh Mining & Manufacturing Company? A valuable consideration cannot be presumed merely because the agreed statement of facts recites that the Virginia corporation executed and delivered a deed of 'bargain and sale' conveying all its right, title, and interest to the Pennsylvania corporation. In view of the admitted facts, that recital must be taken as meaning nothing more than that the deed was, in form, one of bargain and sale, conveying the technical legal title. The deed cannot be regarded even as a deed of gift, unless we suppose that a body of stockholders, acting under one corporate name, solemnly made a gift of property to themselves acting under another corporate name. When it is remembered that the plaintiff in error stipulates that all that was done had for its sole object to create a case cognizable in the federal court, which would otherwise have been cognizable only in a court of Virginia, it is not difficult to understand why the agreed statement of facts failed to state, in terms, that a valuable consideration was paid by the grantee corporation.
>
> The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and

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> conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the federal court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case."

If the record in this case justified the assumption that there was no valuable consideration for the conveyance of the land to the Pennsylvania corporation, the complaint here even more strongly justifies such assumption. In acquiring the right as lessee to quarry stone on this property, the Ohio corporation of the same name was transferring a thing of no value at all to it, since it had been permanently enjoined from carrying on such operations. Whatever the new Delaware corporation paid to the Ohio corporation in acquiring the right as lessee to quarry stone on this property is entirely immaterial since, in view of the substantially identical ownership of both corporations, the payment of any consideration only amounted to taking money out of one pocket and putting it into another.

Even without the admissions of counsel in open court as to stock ownership of these two lessee corporations, as noted by Judge Picard in his opinion (Record, p. 13a), the complaint on its face discloses that the new Delaware corporation is not the real party in interest.

A. The Filing of the Supplemental Petition in the Common Pleas Court.

Petitioner in its complaint alleges that "no summons was issued on said supplemental petition" which was filed as alleged on June 1, 1948, "at the time of the opening of the trial in this cause". This supplemental petition as shown

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by the complaint alleged that since the filing of the original petition seeking to enjoin a threatened nuisance, the defendants had started quarrying stone on these premises by blasting and crushing operations.

Where facts material to a case have occurred since the filing of an original petition, as was the situation here, the law of Ohio expressly authorizes the filing of a supplemental petition, and does not require that summons be issued on such supplemental petition. Section 11368 of the General Code of Ohio provides:

> "On such terms as to costs as the court, or a judge thereof, prescribes, either party may be allowed to file a supplemental petition, answer or reply, alleging facts material to the case which occurred since the filing of the former petition, answer or reply. Reasonable notice of the application therefor must be given when the court or judge so requires."

The complaint shows no irregularity in the filing of this supplemental petition, nor did the state Court of Appeals or the Supreme Court find any such irregularity.

B. The Argument That the Judgment of the Court of Appeals is Inequitable, Unconscionable and Absolutely Void as Prohibited by the XIV Amendment to the Constitution of the United States.

Petitioner argues that since the quarrying of stone is a lawful business, not a nuisance per se, and recognized and regulated by the state, equity does not have the power or jurisdiction to enjoin such an operation without compensation therefor, without violating the XIV Amendment; it is argued that the courts have no power to prohibit such business without compensation—without rendering such decree or judgment void under the United States Constitution.

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We are not here concerned with any attempt on the part of any court to prohibit the business of stone quarrying, but only a decree enjoining the quarrying of stone in this particular residential neighborhood. The courts of Ohio and every other state in the Union have consistently enjoined the conduct of certain businesses in residential neighborhoods which are not nuisance per se and which are regulated by the state. It has consistently been recognized that a business not a nuisance per se may become such when conducted in a residential neighborhood. In **Dagenhart v. Harford**, 59 O. A., 552, the second syllabus is as follows:

> "2. A reviewing court will overrule a motion to modify a continuing injunction on the ground that a municipal zoning ordinance, in effect at the time the decree was entered and forbidding the maintenance of a funeral home in a residence district, had been modified, where the court in the original case found as a matter of law that the operation of a funeral home in close proximity to plaintiff's residence was a nuisance."

It is interesting to note that the business of maintaining a funeral home, like the business of embalming, is likewise a lawful business, recognized, regulated and licensed by the state; Sections 1335-1, et seq., General Code of Ohio. **This case is a complete answer to the argument that because of the state regulating the operation of stone quarries, the courts are without jurisdiction to enjoin such operations in residential neighborhoods.**

See also **Landeman v. Lamb Construction Company**, 297 S. W., 184, where the operation of a stone quarry in a residential neighborhood was enjoined. In **Fagan v. Silver**, 188 Pac., 900, the Supreme Court of Montana unanimously sustained the lower court in enjoining the operation of a stone quarry. In **Jones v. Kelly Trust Co.**, 18 S. W. (2d),

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356, the Supreme Court of Arkansas recognized that the operation of a stone quarry and rock crusher might be lawful in one location but unlawful and a nuisance in another locality. A further citation of authorities in support of this fundamental and elemental rule should not be necessary.

C. The Allegation that Property in Question is Located in a Quarrying Region.

Presumably the allegations in the complaint and statements in plaintiff's memorandum on this point are made to support the argument that the decree enjoining the operation of plaintiff's stone quarry in this residential neighborhood is inequitable and unconscionable. As a matter of fact, these allegations disclose the propriety of the decree.

Courts are more reluctant to grant an injunction where the nuisance consists of the operation of a business which must be conducted at a fixed place, than they are to enjoin a nuisance caused by a factory and business which may be removed to another location. **Brede v. Minn. Crushed Stone Co.**, 6 A. L. R., 1092. If this same quality of limestone were only found on plaintiff's property it is doubtful if these quarrying operations would have been enjoined, or if the original action would ever have been brought. **But, as alleged by plaintiff, this is a quarrying region and no showing could accordingly be made of any necessity for quarrying stone in this particular residential neighborhood.**

Plaintiff's own allegations on this point support the propriety and validity of the injunction decree rather than its inequity and invalidity.

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D. The Attempt to Raise a Federal Constitutional Question.

Plaintiff alleges that the enforcement of the injunction denies the plaintiff due process of law and equal protection of the laws. Even if this were an appeal from the state judgment to the Supreme Court of the United States, it would be necessary to show that the constitutional question had been timely raised. In **Herndon v. Georgia,** 295 U. S. 441, this court held that an attempt to raise a federal question in a state court after judgment, upon a petition for rehearing, does not furnish a basis for review by this court unless the state court actually entertains the question and decides it. Nor could it be contended if this were an appeal of the state action that this case falls within the exception to the above rule that the federal question first arose from the unanticipated act of the state court in granting a permanent injunction. The decree complained of was in accordance with the prayer of the petition in the trial court and on its face precludes any assumption of not being anticipated.

Since even in an attempt to review the decree in injunction there is no showing of any federal constitutional question having been timely raised, **a fortiori** in this attempt to re-litigate the case on the same facts in the district court the allegation of deprivation of due process and equal protection was clearly of no avail, and could not serve to confer jurisdiction over the subject matter.

This question of violation of the XIV Amendment might properly have been litigated in this case in the state court. It is conclusively settled in that litigation. The first branch of the syllabus in **Quinn, Aud., et al. v. State, ex rel.,** 118 O. S., 48, is pertinent:

> "1. Material facts or questions which were in issue in a former suit and were there judicially determined by a court of competent jurisdiction are conclusively

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> settled by the judgment therein so far as concerns the parties to that action and persons in privity with them and cannot be again litigated in any future action between the same parties or privies, and this rule also applies not only to what was determined but also as to every other question which might properly have been litigated in the case. (Hixon v. Ogg, 53 Ohio St., 361, 52 N. E., 32, and Strangward v. American Brass Bedstead Co., 82 Ohio St., 121, 91 N. E., 988, followed and approved.)

In the opinion the Ohio Supreme Court, speaking through Robert H. Day, J., at pp. 55 and 56, quoted the following language of this court in **So. Pac. Rd. C. v. United States**, 168 U. S., 1, at page 48 as follows:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In view of the fact that the plaintiff corporation was not the real party in interest in the court below and such court had no jurisdiction over the subject matter, the question

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of whether or not the decree of the Court of Appeals of Franklin county, Ohio, is violative of any constitutional right may not be considered. The complaint shows on its face privity in interest between the new Delaware corporation and the parties to the state case. The bill of complaint discloses the fact that the owner and prior lessee of this property did not file a motion to certify in the Supreme Court of Ohio after the Court of Appeals denied the motion to vacate, suspend or modify the judgment previously rendered by such court. Under such circumstances, even the real parties in interest not having exhausted their state remedies could not now raise a constitutional question. **Ex Parte Hawk**, 321 U. S., 114; **Darr v. Burford**, 339 U. S., 200. These are habeas corpus cases but the rule **a fortiori** would be applicable to the case at bar, if the constitutional question could be reached.

II.

COMPLAINT BELOW FAILED TO STATE A CLAIM AGAINST DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED.

A. The Injunction in Force Against Lillian E. Snouffer and J. & L. Snouffer, Inc., an Ohio Corporation, Issued by the Court of Appeals of Franklin County is Valid Against This Plaintiff.

There is no question but that the face of the bill clearly discloses privity in interest between the new Delaware corporation, present lessee of the property of Lillian E. Snouffer of which she is president and therefore executive head, and her former lessee, the Ohio corporation of the same name. On the facts here the injunction against her

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and her previous lessee is clearly valid against this plaintiff under authority of **Walling v. Reuter, Inc.**, 321 U. S., 671. At page 674 the court said:

> "The judgment rendered by the District Court determined, subject only to resort to the prescribed appellate review of the judgment, the right of the administrator to an injunction restraining the corporation and those associated or identified with it from violating the statute. Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, Wilson v. United States, 221 U. S., 361, 376, 377; 55 L. ed., 771, 777, 778, 31 S. Ct. 538, Ann. Cas. 1912D 558; cf. Re Lennon, 166 U. S., 548, 41 L. ed., 1110, 17 S. Ct., 658, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons"

In support of the foregoing this court, among many other authorities, cited the case of **Fertilizer Co. v. Ruh**, decided by the Court of Appeals of Franklin county, 7 O. App., 430, the syllabus of which reads:

> "Where the property and business of a corporation is transferred to and accepted by a new corporation of the same name and with the same managing officers, an injunction issued and in force against the old company prior to and at the time of the transfer is binding upon the new company while managing the plant and property so acquired and engaged in the same or similar business thereon, although the order of injunction did not expressly include the officers, agents and assignee of the original company."

The Court of Appeals was entirely correct in sustaining the District Court on the ground of res judicata since the injunction of the state court carried over to the petitioner.

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B. The Jurisdiction of the Court of Appeals of Franklin County Having Already Attached is a Continuing Jurisdiction and the District Court was Right in Not Taking Jurisdiction of the Subject Matter of this Action.

A final judgment of a court of equity enjoining a nuisance is a continuing process over which the court necessarily retains jurisdiction to give effect to its decree and to do equity. The rule is stated in headnote 5 of **Santa Rita Oil Co. v. State Bd. of Equalization** (Sup. Ct., Mont.), 116 P. 2d, 1012, 136 A. L. R., 757, as follows:

> "5. A final or permanent injunction is a continuing process over which the equity court necessarily retains jurisdiction in order to do equity, including the power to modify or vacate it if the law has changed or equity no longer justifies its continuance."

The action in the state courts enjoining the owner of this property, the president of this new Delaware corporation, and her former lessee corporation from conducting stone quarrying operations in this residential neighborhood, was an action dealing with specific property and was at least an action quasi in rem. The real question decided by the state courts was that this particular property, situated as it is in a residential neighborhood, could not be used as a stone quarry. The essential question decided was the use of this property as a stone quarry, not the particular person who so used it. The District Court was right in holding that the action has elements of both an action in personam and an action in rem, which we believe is to say that it is an action quasi in rem. Under such circumstances the District Court could not exercise jurisdiction over the res because the jurisdiction of the state court has already attached to it. In **Kline v. Burke Construction Co.,**

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260 U. S., 226, 231, this court said quoting from **B. & O. R. Co. v. Wabash R. Co.**, 57 C. C. A., 322, 19 Fed., 680:

> "It is settled that when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted * * * The rule is not only one of comity, to prevent unseemly conflicts between state courts and those of the United States it is something more. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience.' Covell v. Heyman, 111 U. S. 176, 28 L. ed 390, 4 Sup. Ct. Rep. 355. The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshall assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature. Farmers' Loan & T. Co. v. Lake Street Elev. R. Co., 177 U. S. 51, 44 L. ed 667, 20 Sup. Ct. Rep. 564; Merritt v. American Steel Barge Co. 24 C. C. A. 530, 59 U. S. App. 85, 79 Fed. 228. The rule is limited to actions which deal either actually or potentially with specific property or objects."

This same principle was followed by this court in **U. S. v. Bank of New York and Trust Co.**, 296 U. S., 463, the court stating on pages 477 and 478:

> "The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. **It applies as well** where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, **where, to give effect to its jurisdiction, the court must control the property.** Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 51,

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61, 44 L. ed. 667, 671, 20 S. Ct. 564. If the two suits are in rem or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 195, 79 L. ed. 850, 855, 55 S. Ct. 386. This principle is applied in the discharge of the long recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States.'" (Emphasis added.)

Of similar import is **Princess Lide v. Thompson**, 305 U. S., 456.

It is indisputable that the Court of Appeals of Franklin county must continue to have control of the res with respect to its use to grant the relief to which it found these neighboring property owners were entitled.

C. The Complaint Alleges No Change in Factual Conditions Upon Which to Base a New Action to Modify the Injunction.

There is no allegation in the complaint of any changed conditions in this residential neighborhood upon which a new action to vacate or modify the decree could be based, even if the District Court rather than the state court could be said to have jurisdiction of such new action. The action here is but an attempt to re-litigate the case on the identical facts. In the annotation on the subject of the power to modify a permanent injunction appearing in 136 A. L. R., 765, the following is said at page 770:

> "Where there is no change in the circumstances at all, and a modification of an injunction is sought upon the identical facts upon which it was issued, the courts

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have declined to modify it, sometimes stating that they had no jurisdiction whatever to modify their decree after the passing of the term. * * *

Likewise, upon the broad ground that a court, except as authorized by statute or by recourse to appropriate common-law procedure, is without authority to disturb its final judgment after the judgment term is ended, and that the inhibition of this rule applies no less to decrees in equity than to judgments rendered in actions at law, a motion to dissolve a permanent injunction was denied in State ex rel. Caplow v. Kirkwood (1938) — Mo. App. —, 117 S. W. (2d) 652, where the defendant moved to dissolve an injunction restraining him from engaging in certain professional activities without the plaintiff's consent, upon eleven alleged grounds, all of which purported to be addressed to the merits of the questions whether or not the injunction should have been granted in the first instance. However, the case does not conflict with the general rule, because the mere fact that the original decree was erroneous does not justify the exercise of the power of the court to modify an injunction, and because no change in the facts or the law was alleged."

III.

THE ISSUE, RAISED BY THE COMPLAINT AND MOTION OF DEFENDANTS BELOW, WAS RES JUDICATA ENTITLING DEFENDANTS-APPELLEES TO A DISMISSAL OF THE ACTION ON THAT GROUND.

A. All Relevant Facts Being Shown by the Complaint, Res Judicata Was Properly Raised by Motion.

In addition to the fact that this court is without jurisdiction over the subject matter of this action, the jurisdiction of the state court having first attached and such jurisdiction being a continuing jurisdiction, the issue sought to

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be raised between the parties herein by the bill of complaint is res judicata. While ordinarily this question is required to be specifically pleaded in an answer, there are some circumstances under which it has been held to be properly raised by motion to dismiss. The first headnote in the case of **W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, Inc.**, 92 Fed. Supp., 112, (1950) is as follows:

> "While Federal Rules of Civil Procedure specifically require that defense of res judicata be specifically pleaded in answer, and such defense is not mentioned by name as one of defenses which may be presented by motion, motion to dismiss complaint on ground of res judicata is proper, especially where judgments relied upon are ones which were rendered in very court which is asked to pass upon motion. Fed. Rules Civ. Proc. rules 12(b), 8(c), 28 U. S. C. A."

It should be noted that the foregoing case does not limit the right to raise the question of res judicata on motion to dismiss where the judgment relied upon was rendered in the same court which is asked to pass upon the motion, the court merely holding that under such circumstances the defense of res judicata may **a fortiori** be raised by motion. After citing the appropriate federal rules of civil procedure, the court said at p. 113:

> "However, it would be the utmost folly to construe the rules to forbid the assertion by motion prior to answer of a defense like res judicata, especially where the judgments relied upon are ones which were rendered in the very court which is asked to pass upon the motion. At the very least such a motion can be treated as a speaking demurrer within the spirit of the rules."

The above decision was appealed to the Circuit Court of Appeals of the Second Circuit, 186 Fed. 2d, 236, which

stated this same principle as set forth in the second headnote:

> "2. The defense of res judicata should usually be pleaded, but where all the relevant facts are shown by the court's own records, of which it takes notice, an answer is not first required. Fed. Rules Civ. Proc. rule 8(c), 28 U. S. C. A."

In the case at bar all the relevant facts are shown by the bill of complaint itself of which this court takes notice just as it would of an earlier decision appearing in its own records. An answer under such circumstances is not first required to raise this defense.

B. There Being Privity in Interest in the Subject Matter, the Issue Raised is Res Judicata in All Courts.

The applicable rule is stated in **30 Amer. Jur.**, pages 908, 909, under the heading "Judgments Res Judicata" as follows:

> "Briefly stated, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. * * *
>
> Under the rule firmly established in the United States, the doctrine of res judicata extends to judgments of all courts. The doctrine prevails whether the judgment involved is rendered by the same court in which the subsequent action is prosecuted, or by a court of independent or concurrent jurisdiction."

If it may be said that the parties here are not the same as in the state courts, there is no possible question but that there is clear privity in interest in the subject matter of the litigation; to wit, the property owned by Lillian E.

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Snouffer, within the meaning of the doctrine of res judicata. On this point the text in **30 Amer. Jur.**, 957, Judgments, Section 225, headed "Persons included as Privies," reads as follows:

> "There is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of res judicata. Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title. Under this rule, privity denotes mutual or successive relationship to the same right of property, and there is privity within the meaning of the doctrine of res judicata where there is an identity of interest and privity in estate, so that a judgment is binding as to a subsequent grantee, transferee, or lienor of property. This is in harmony with the view that **a judgment is binding on privies because they are identified in interest, by their mutual or successive relationship to the same rights of property which were involved in the original litigation.**" (Emphasis added.)

C. The Motion in the State Court of Appeals After Judgment.

The complaint alleges (p. 8a, appendix to appellant's brief) that when the Snouffers endeavored to modify or vacate the decree in injunction after term by a motion in the Court of Appeals, the court held that such action should be taken by a petition in the Common Pleas Court. This decision was not carried to the Supreme Court of Ohio. Appellant contends that the Common Pleas Court could not vacate the judgment of the Court of Appeals. The fact of

the matter is that under the law of Ohio as held by the Court of Appeals in this litigation, that is exactly what the Common Pleas Court could do in a proper action based upon a change in the law or the material facts such as would justify a modification of the prior injunction decree. It was the decree of the Common Pleas Court which originally granted the injunction and which order was appealed. Appellant has not seen fit to pursue this remedy, which appellant has at any time, and which the Court of Appeals expressly held was available. She is merely attempting here to relitigate the same question on the same facts.

The facts or questions in issue and judicially determined by the state courts in this litigation are conclusively settled by the existing judgment so far as concerns the parties to that action and their privies, and this rule applies not only to what was determined but to every other question which might properly have been litigated in the case. **Quinn, Auditor, et al. v. State ex rel.**, 118 O. S., 48; **Southern Pacific Rd. Co. v. U. S.**, 168 U. S., 1.

IV.

JUDGMENT OF THE COURT OF APPEALS.

Petitioner comments upon the fact that the Court of Appeals sustained the District Court solely on the ground that the issue was **res judicata** and ignored the question of jurisdiction. This judgment of the Court of Appeals necessarily is based upon the fact that the District Court had no jurisdiction over the subject matter for the reason that there was no real diversity of citizenship and the plaintiff was bound by the decree of the state court, the jurisdiction of which had already attached as stated in the order of the District Court (Record, page 17a). The issue was accord-

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ingly **res judicata** as far as such plaintiff was concerned. The finding of the Court of Appeals that the issue raised is **res judicata** carries with it an affirmance of the District Court that the plaintiff is bound by the decree of the state court that the District Court had no jurisdiction over the subject matter and that the complaint failed to state a claim against the defendants upon which relief could be granted. The Court of Appeals wrote no opinion for the obvious reason that the soundness of the decision of the District Court was so apparent as not to justify an opinion.

V.

PETITIONER'S REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner first contends that the decisions of this court in **Smythe v. Ames**, 169 U. S., 466, **Hart v. Keith, etc.**, 262 U. S., 271, **Swafford v. Templeton**, 185 U. S., 482, declared it was error to dismiss a petition such as was filed in the District Court in this case. These decisions are no authority for such statement.

Smythe v. Ames related to fixing railroad rates and is not apposite.

Hart v. Keith held that jurisdiction is determined by the allegations of the bill, and cases should be decided on their merits unless the want of jurisdiction is entirely clear. In the instant case the want of jurisdiction is crystal clear.

Swafford v. Templeton involved an asserted wrongful refusal to permit plaintiff to vote for a member of the House of Representatives at a national election. It held that the question was essentially federal and recognized the bill must present a bona fide federal question. It likewise is not apposite.

The petitioner next says that the judgment of the Court of Appeals is in conflict with controlling decisions of this court in **Wells Fargo v. Taylor**, 254 U. S., 175; **Marshall v. Holmes**, 141 U. S., 589; **Ex parte Simon**, 208 U. S., 141; **Simon v. Southern Ry. Co.**, 236 U. S., 115; **Pub. Serv. Co. v. Cosboy**, 250 U. S., 153; **Nat. Surety Co. v. State Bank**, 120 Fed., 593.

The **Wells Fargo** case as well as the **Marshall** case, the case of **Ex parte Simon v. Southern Ry. Co.** all involve judgments obtained by fraud, which element is not present in the case at bar.

The **Public Service Co.** case held that a state officer may be enjoined from carrying into effect a state law which may be repugnant to the Constitution of the United States and is not relevent.

The **National Surety Company** case was an action to obtain relief from judgment in a state court on the ground that through mistake of a public officer of which he alone was responsible, judgment had been rendered without opportunity for putting up a defense and this when there was one which was both meritorious and complete. No such facts are present in the case at bar. This litigation was thoroughly and competently tried in all of the state courts.

Heading 3 of petitioner's reasons relied on for allowance of the writ has hereinabove been answered.

It is next contended that the Court of Appeals went outside of the allegations of the petition instead of being confined to such allegations. We have hereinabove pointed out that the complaint on its face disclosed that the issue is res judicata.

Under heading 5 of petitioner's reasons for allowance of the writ it is contended that the District Court erred in ignoring the action and prayer of petitioner for a declara-

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tory judgment. Title 28, Section 2201 United States Code confers upon any federal court of the United States jurisdiction in declaratory judgment **in cases of actual controversy within its jurisdiction.** The statute is limited in its operation to those within the jurisdicton of federal courts. **Sou. Pac. Co. v. McAdoo,** 82 Fed. 2d 121; **Garvica v. Donaugh,** 93 Fed. 2d, 173; **Cen. Mexico Lt. & Power Co. v. Munch,** 116 Fed. 2d, 85. This action not being within the jurisdiction of the District Court, it was unnecessary to comment upon the prayer for declaratory judgment.

It is finally alleged that the judgment of the Court of Appeals in this case is in conflict with the decisions of this court in **Mosher v. Phoenix,** 287 U. S., 29; **Cuyahoga R. R. v. Akron,** 240 U. S., 462; **Regan v. Farmers L. and Trust Co.,** 154 U. S., 362; **Chicago v. Chicago,** 166 U. S., 226; **Near v. Nimes, ex rel.,** 283 U. S., 697.

The **Mosher** case was an original action in the District Court in which the complaint sought to enjoin the city from appropriating petition's land for street improvement, alleging that there had been no dedication of his land to the city and no proceedings for condemnation, resulting in an attempt to take his property without due process and without compensation. The court properly held that this presented a substantial federal question.

Cuyahoga Railway case came to this court by direct appeal and was another case involving the right of a city to take plaintiff's property and award compensation without instituting any proceedings to acquire such property.

The **Regan** case involved certain actions of the state railroad commissioners in fixing and enforcing unjust and unreasonable rates.

The **Chicago v. Chicago** case is authority for the elementary proposition that private property may not be taken even if authorized by statute without compensation.

The **Near** case was an appeal from a decision of the Supreme Court of Minnesota adjudging that publication conducted by defendant to be a nuisance and enjoining further like publication. The judgment of the state court was affirmed.

It is obvious that none of these authorities are in conflict with the decision of the District Court and the Court of Appeals in this case. The judgment of the state court is not one taking petitioner's property but is merely one of the hundreds of cases where the courts have enjoined the carrying on of an activity which amounts to a nuisance in a residential neighborhood. As stated by Judge Picard in the opinion of the District Court, "There are an unlimited number of cases in every state of the Union controlling nuisances. If, after every such decision a rehearing on the same facts can be held in the federal courts, then of what use are the state court decisions?"

CONCLUSION.

In conclusion, it is submitted that the decision of the Court of Appeals affirming the District Court in this case is entirely in accordance with the controlling decisions of this court hereinabove cited, discussed and relied upon, as well as the controlling decisions of other Courts of Appeals herein cited.

This litigation commenced in 1947, over six years ago. The question of whether or not stone quarrying operations could be carried on in this residential neighborhood on this property was litigated first, in the Common Pleas Court; second, in the Court of Appeals of Franklin county; third, in the Ohio Supreme Court; fourth, again in the Court of Appeals of Franklin county; fifth, in the United States District Court; and, sixth in the Court of Appeals. These

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neighboring property owners are now again brought into this court by Mrs. Snouffer's new lessee corporation of which she is president. As stated by the District Court, "there must come a time when litigation should terminate."

We submit that the petition for certiorari should be denied.

Respectfully submitted,

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No. 324.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

J. & L. SNOUFFER, INC.,
Petitioner,

vs.

WILBUR B. ADAMS, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONER.

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AUTHORITIES CITED.

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REPLY BRIEF OF PETITIONER.

Petitioner was admonished by the rules of this court (R., 38) and by the applicable decisions and all authorities on federal practice that on a petition for a writ of certiorari to the U. S. Court of Appeals, the court will consider only the **"questions presented"** by the petition. It was also settled, that argument on the merits was not to be tolerated. 304 U. S., 175, 177, 178, 82 L. Ed., 1273, 1275, Gen Talk v. West. Elec. Co.

Twenty-three pages of respondents' brief is devoted to an argument on the alleged merits as they construe the merits. Four pages are devoted to a discussion, as respondents construe it, of the alleged conflict, set forth under "petitioner's reasons".

No consideration whatever was given by respondents to **"the questions presented"**, which this court declared it only will consider.

It was observed by a distinguished member of this court in 48 Harv. L. R., p. 269, on this matter:

> **"That the element of importance lies in the fact of conflict rather than the nature of the issue."**

The respondents reveal by their proposed analysis of the decisions cited under "reasons", that they consider only the facts involved, that is the issues, facts and merits of the cases cited, rather than the principle and ruling involved in the conflict.

They ignore or do not seem to comprehend that this action was a new and original suit in equity between individuals in the District Court as characterized by the U. S. Supreme Court in reported decisions, setting up facts, which it was and is contended involve the settled controlling principles of equity, applicable alike in all courts, federal and state, and which it was and is contended, renders the alleged judgment inequitable, unconscionable and subject to an **injunction against enforcement by the individual respondents.**

Also that a right created by the Fourteenth Amendment to the United States Constitution was set up and facts alleged, which show, if true, that the guarantees of such amendment were violated, rendering such judgment void.

Equity is a vast reservoir of principles, declared, established and settled by precedents, controlling rights, pro-

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cedure, pleading, jurisdiction and relief and chancery courts are as much bound by them as law judges are by the law. Pomeroy Eq. Jur., Vol. 1, Sec. 47, 48, 987, 19 Amer. Jur., p. 313, Sec. 454. They are also bound by the Constitution of the United States, as exemplified in Bigelow v. Forrest, 9 Wall., 339, 351; Ex parte Lange, 18 Wall., 163, 176, 178, 21 L. Ed., 872, 878, 879.

The United States Court in equity, is not limited in its relief as inferred by respondents in their argument under "reasons" to mere cases of "fraud".

This is conclusively established by the decision of this court in Simon v. South Ry. Co., 236 U. S., 115, 119, 122, 124, 125, 59 L. Ed., 492. The court said, p. 121, 236 U. S., p. 497, 59 L. Ed.: "The primary question is whether the United States court had jurisdiction of the case. **This must be determined by the allegations of the bill.**" Then the court stated, to indicate that relief by injunction, as sought herein, was not limited to cases of fraud, which was present in 236 U. S., but will be applied, wherever and whenever, under the controlling established principles of equity, the alleged judgment was rendered inequitable, unconscionable and unenforceable, and **whether valid or void,** the court therein stated as follows, p. 125: **"That other cases might be cited involving the same principle."**

That is, **where "Equity is found to exist appropriate relief is granted".** That requires a hearing to determine on the merits. We contend we were denied a hearing on the merits under both the Fourteenth and Fifth Amendments to the United States Constitution (see R., p. 22, paragraph "2", petition for rehearing).

The over-reaching fundamental question involved in this case is the jurisdiction of the District Court under the

Atlas L. Ins. Co. vs. U. S., 306 U. S. 563, 83 L. Ed.